(2)

No. 06-927

Supreme Court, U.S.
FILED
FEB 05 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LARRY CONWAY and MARILYN CONWAY,

Petitioners,

v.

PRESTON WILSON, Chapter 7 Trustee, and
UNITED STATES Trustee for Region 7, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR CHAPTER 7 TRUSTEE

RUSSELL W. SAVORY
88 Union Avenue, 14th Floor
Memphis, TN 38103

Attorney for Respondent
P. Preston Wilson, Trustee

206413

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Of the questions presented by Petitioners, only question numbers 1, 4 and 6 are related to the cases appealed to and decided by the United Court of Appeals for the Sixth Circuit ("Sixth Circuit"). These will be addressed more fully below.

The issues that Petitioners attempt to raise in questions numbers 2, 3, 5 and 7 were not raised before the Bankruptcy Court, the Bankruptcy Appellate Panel for the Sixth Circuit ("BAP") or the Sixth Circuit. These questions are not the subject of any order or judgment entered by any of these courts. Therefore, these questions are not properly before this Honorable Court, and will not be addressed by Respondent, other than verifying jurisdiction of the Bankruptcy Court and the Bankruptcy Appellate Panel.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

TABLE OF APPENDICES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 1

I. INTRODUCTION 1

II. QUESTIONS #1 AND #4 1

A. Petitioners' Patterns of Behavior 1

B. Discussion of Patterns 2

1. Failing to Appear 2

2. Refusal of Petitioners to Comply with Bankruptcy Code 3

3. Misunderstanding and Misstating Applicable Law 5

(a) Discharge 5

Contents

Page

(b) Administration After Denial of Discharge 6

(c) "Abuse" of Judicial Power 7

C. Questions #1 and #4 Do Not Merit Review By this Honorable Court 8

III. QUESTION #6, WRIT OF ENTRY 8

IV. QUESTIONS #2, #3, #5 AND #7 8

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

Statutes:

11 U.S.C. § 101, *et seq.* 2

11 U.S.C. § 341 3

11 U.S.C. § 727 6

11 U.S.C. § 1141 6

11 U.S.C. § 1228 6

11 U.S.C. § 1328 6

28 U.S.C. § 158(a) 8

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States District Court For The Western District Of Tennessee, Western And Eastern Divisions Filed July 11, 1984 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Tennessee, Western Division Filed December 14, 1999 .... 2a

Appendix C — Order Of The United States District Court For The Western District Of Tennessee, Western Division Filed December 29, 1999 .... 4a

STATEMENT OF THE CASE

Respondent Trustee adopts as his "Statement of the Case" the "Background" section of the Sixth Circuit Opinion, Petition Appendix A, at 2a-9a. (All references to "Petition Appendix" are to the Appendix to the Petition for Writ of Certiorari).

REASONS FOR DENYING THE PETITION

I. INTRODUCTION

The Sixth Circuit correctly analyzed and decided all of the issues raised before it regarding denial of Petitioner Larry Conway's discharge and the sale of the personal property of the estate derived from Petitioners.

Petitioners raise no issues in their Petition for Certiorari that are of a character which merits review under the standards of Rule 10 of the Rules of the Supreme Court of the United States.

II. QUESTIONS #1 AND #4

A. Petitioners' Patterns of Behavior

In accordance with SUP. CT. R. 15.2, Respondent believes it is important for this Honorable Court to be aware of several consistent patterns of behavior displayed by Petitioners throughout the administration of their bankruptcy case. Knowledge of these patterns of behavior is essential in understanding and evaluating the claims made by Petitioners in their Petition for Certiorari. These patterns are as follows:

1. Petitioners more often than not would fail to appear at hearings on matters being adjudicated by a court and then appeal, objecting to being dispossessed of their constitutional and statutory rights.

2. Petitioners repeatedly claimed that the Bankruptcy Court in particular and other courts in general have failed to properly apply the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, while they have consistently refused to comply with their clear obligations under the Bankruptcy Code.

3. Petitioners have consistently failed to understand (or at least acknowledge understanding) and accept black-letter law applicable to their case if they do not like the result.

Each of these traits is revealed in the instant Petition for Certiorari and will be discussed more fully below.

B. Discussion of Patterns

1. Failing to Appear

With respect to trait number one, failing to appear, Respondent would refer this Honorable Court to the "Background" section (Factual, at 3a - 4a, and Procedural, at 5a - 9a) of the Sixth Circuit's Opinion, Petition Appendix A. In that section, the Sixth Circuit noted eleven (11) instances when Petitioners "did not appear," "failed to comply with . . . Order [to] appear [ ]," "failed to answer," had a "default" entered against Petitioner Larry Conway or had an appeal dismissed for failure to prosecute.

In the Bankruptcy Court's ORDER GRANTING MOTION TO SELL PROPERTY AND ASSISTANCE OF MARSHALS IN CONDUCTING SALE (Petition Appendix C, at 19a), the Bankruptcy Court specifically noted that the Motion "was set for 10:00 a.m. on April 22, 2004, and by 11:30 a.m. April 22, 2004, neither Larry Conway or Marilyn Conway had appeared for the hearing."

Petitioner himself acknowledged that he "refused to respond to discovery or to a second debtor examination" and "refused to attend the [Chapter 7] creditor's meeting." Petition for Certiorari, at 3. He asserts that this "was his right under the First Amendment to the United States Constitution." *Id.* Respondent Trustee respectfully disagrees.

Throughout this Chapter 7 case, Petitioners have continually demonstrated a consistent pattern of failing to answer or appear on the merits of a issue and then appealing and seeking to have the appellate court fix the problem Petitioners have created for themselves.

2. Refusal of Petitioners to Comply with Bankruptcy Code

The second trait of Petitioners is their repeated complaints that the courts handling Petitioner's numerous matters are not complying with the Bankruptcy Code, all the while flouting their duties as Debtors under Chapter 11 and later under Chapter 7 of the Bankruptcy Code. The most outrageous example of this is Petitioner Larry Conway's long running complaint that there has never been a Meeting of Creditors as required by § 341 of the Bankruptcy Code, 11 U.S.C. § 341. Petition for Certiorari, at 4. Yet, Petitioner admits that he "refused" to attend the Creditor's Meeting.

Petition for Certiorari, at 3. Petitioner's complaint is ironic indeed in the face of his recalcitrance, which has made proper administration of the bankruptcy case much more difficult.

Beyond pointing out this irony, Respondent Trustee would assert that all the courts that have been engaged by Petitioners — Bankruptcy, District, Bankruptcy Appellate Panel ("BAP"), Sixth Circuit and now this Honorable Court — have extended extraordinary deference, patience and courtesy to Petitioners in administering their case. The Bankruptcy Court took great care to see that all procedural formalities were followed, that substantive legal requirements were met and that the Conways had every opportunity to present evidence and argument on their own behalf. See Order Granting Motion to Sell Property, *supra,* at 3.

Petitioners failed to file briefs in at least two of the cases appealed to the Bankruptcy Appellate Panel. The BAP gave Petitioners notice and opportunity to cure this default before dismissing their appeals for failure to prosecute. Sixth Circuit Opinion, Petition Appendix A, at 8a, 9a. Likewise, the Sixth Circuit gave Petitioners notice and opportunity to cure their default in failing to timely file the record on appeal to avoid dismissal of their appeal. Finally, this Honorable Court gave the Petitioners an extension of sixty days in which to file their Petition for Certiorari.

All substantive and procedural laws and rules have been carefully followed by all the courts that have adjudicated Petitioners' cases.

3. Misunderstanding and Misstating Applicable Law

Petitioners continue to be unable or unwilling to understand and accept applicable law in their case and what it requires. This is illustrated by the opening lines of Petitioner's first Question Presented.

> Whether the actions of the Bankruptcy Court in wrongfully denying a discharge to the Debtor and thereafter continuing to administrate [sic] the estate of the Debtor effectuated a taking of the assets of the Debtor thereby constituting an abuse of judicial power . . . .

This phrase reveals at least three misconceptions Petitioners have and misstatements as to the applicable law in their case. These are: i) that the denial of Larry Conway's discharge was wrongful; ii) that denial of Petitioner's discharge has somehow prevented continuation of the administration of his Chapter 7 case; and iii) that the taking of assets from Petitioners possession was "an abuse of judicial power."

(a) Discharge

Regarding denial of Petitioner Larry Conway's discharge, it should first be noted that the Judgment was entered based upon a default judgment. Petitioner failed to appear and defend. See Section B. 1., above. After the Judgment was entered, Petitioner "never asked the Bankruptcy Court to set aside the default nor did he attempt to show good cause for relief as to the default." Sixth Circuit Opinion, Petition Appendix at 10a. In entering the default judgment the

Bankruptcy Court noted six specific, substantive grounds for denial of Larry Conway's discharge. Petition Appendix, at 6a. The Sixth Circuit noted the same grounds and then observed

> It is likewise clear that the bankruptcy court complied with all procedural and substantive requirements and that Conway was afforded notice and opportunity to be heard prior to the entry and judgment of default. Petition Appendix, at 12a.

Thus, denial of Petitioner Larry Conway's discharge was in no way "wrongful." Petitioners belief that it was is misplaced and erroneous. Likewise, this premise in Question 1 in invalid.

(b) Administration After Denial of Discharge

Petitioners' complaint about continued administration of the bankruptcy case after denial of Larry Conway's discharge is similarly misplaced and erroneous. There are two separate and independent functions of the Bankruptcy Code. One function is debt relief for the debtor. The other function is payment of creditors. While in most cases these functions move forward in parallel and contemporaneously, they are not necessarily related to one another.

If the Debtor complies with his obligations under the Bankruptcy Code to provide information to the Court and Trustee and turn over property, *inter alia,* the debtor will get a discharge under the Bankruptcy Code, 11 U.S.C. § 727, § 1141, § 1228 or § 1328. If the Debtor fails to do so, he may be denied a discharge.

Separate and independent from the Debtor's discharge is the matter of the collection and liquidation of property of the estate and payment of creditors with the proceeds. If there are assets that can be administered for the benefit of creditors, case administration can and should continue regardless of whether the debtor gets a discharge. Thus, continued administration of Petitioner Larry Conway's case after denial of his discharge was totally consistent with the Bankruptcy Code and the Bankruptcy Court's duty under the Code. This administration resulted in net proceeds of over $69,000.00 for the benefit of creditors in the instant case.

Petitioners' premise that continued administration was improper is invalid.

(c) "Abuse" of Judicial Power

The Trustee's taking of assets from Petitioners' possession was consistent with – indeed required by – the authority and duty of the Trustee and the Bankruptcy Court. It was not an abuse of judicial power. The assets taken from Petitioners' possession were in fact assets of the Petitioners' Chapter 7 *bankruptcy estate*; they were not the assets of the Petitioners. As noted in the previous section, one of the duties of the Trustee and the Bankruptcy Court is the collection and liquidation of assets in order to pay creditors. The Petitioners/Debtors had absolutely refused to cooperate with the Trustee in any regard. They would not turn over this estate property voluntarily. This made it necessary for the Trustee to seize the personal property assets from the Petitioners' possession against their will with the assistance of the U.S. Marshal. This action was totally correct, legal and in proper discharge of the obligations of the Trustee and the Bankruptcy Court under the Bankruptcy Code.

C. Questions #1 and #4 Do Not Merit Review By this Honorable Court

Based on the foregoing discussion and on the well reasoned opinion of the Sixth Circuit, Respondent Trustee respectfully submits that there is no basis for a grant of Certiorari with respect to Questions One and Four of the Questions Presented in Petitioners' Petition for Certiorari.

III. QUESTION #6, WRIT OF ENTRY

Petitioners' Question Six of the Questions Presented is related to the Conway's "appeal" of the Writ of Entry issued by the Bankruptcy Court. The Writ of Entry is not a final appealable order under 28 U.S.C. § 158(a). The Sixth Circuit correctly decided it had no jurisdiction to entertain such an "appeal" and properly dismissed the appeal. This issue does not warrant review by this Honorable Court.

IV. QUESTIONS #2, #3, #5 AND #7

The issues Petitioners attempt to raise in Questions Two, Three, Five and Seven of the Questions Presented were not raised below, and Respondent will not address them. However, in order to leave no doubt as to the jurisdiction of the Bankruptcy Court for the Western District of Tennessee and the Bankruptcy Appellate Panel for the Sixth Circuit, Respondent has included the following orders in his Appendix:

Appendix A. Miscellaneous Order No. 84-30 of the U.S. District Court for the Western District of Tennessee, filed July 11, 1984, referring

all cases, matters or proceedings arising under Title 11 of the U.S. Code to the Bankruptcy Court.

Appendix B. Administrative Order 99-33 of the U.S. District Court for the Western District of Tennessee, filed December 14, 1999, authorizing the Bankruptcy Appellate Panel to hear and determine appeals originating in the Western District of Tennessee, beginning after January 1, 2000.

Appendix C. Administrative Order 99-33, Amended Order, of the U.S. District Court for the Western District of Tennessee, filed December 29, 1999, authorizing the Bankruptcy Appellate Panel to hear and determine appeals originating in the Western District of Tennessee, beginning after February 1, 2000.

CONCLUSION

The Petition raises no issue warranting review and consideration by this Honorable Court under SUP. CT. R. 10, subparagraphs (a), (b) or (c). The Petition essentially alleges "misapplication of a properly stated rule of law," i.e., the Bankruptcy Code. Petitioners' questions would not merit a grant of certiorari if they were based upon solid facts and sound legal analysis. As set forth above, the Questions Presented are not so based.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RUSSELL W. SAVORY
88 Union Avenue, 14th Floor
Memphis, TN 38103

Attorney for Respondent
P. Preston Wilson, Trustee

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN AND EASTERN DIVISIONS FILED JULY 11, 1984

MISCELLANEOUS ORDER NO. 84-30

IN RE:

BANKRUPTCY JURISDICTION AND PROCEDURE UNDER THE BANKRUPTCY AMENDMENTS ACT OF 1984.

By virtue of 28 U.S.C. §§ 151 and 157(a) and § 104 of Title I of the Bankruptcy Amendments Act of 1984, IT IS HEREBY ORDERED that all cases under the Bankruptcy Act and Title 11 of the United States Code and all actions, matters or proceedings arising under Title 11 of the United States Code or arising in or related to a case under the Bankruptcy Act and Title 11 of the United States Code shall be referred to the bankruptcy judges for this Judicial District, who shall exercise the authority conferred under the Bankruptcy Amendments Act of 1984, except as otherwise provided by law or by rule or order of this District Court.

IT IS ORDERED:

ENTER: This 10th day of July, 1984.

s/ Robert M. McRae, Jr.
ROBERT M. McRAE, JR.
CHIEF JUDGE, UNITED STATES DISTRICT COURT

Appendix A

ODELL HORTON
JUDGE, UNITED STATES
DISTRICT COURT

s/ Julia Smith Gibbons
JULIA S. GIBBONS
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION FILED DECEMBER 14, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ADMINISTRATIVE ORDER 99-33

IN RE:

BANKRUPTCY APPELLATE PANEL

ORDER

Pursuant to 28 U.S.C. § 150, the district judges of the United States District Court for the Western District of Tennessee have authorized the Bankruptcy Appellate Panel (BAP) to hear and determine appeals originating in the Western District of Tennessee, beginning January 1, 2000.

IT IS SO ORDERED.

s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

December 13, 1999

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION FILED DECEMBER 29, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

ADMINISTRATIVE ORDER 99-33

IN RE:

BANKRUPTCY APPELLATE PANEL

AMENDED ORDER

Pursuant to 28 U.S.C. § 150, the district judges of the United States District Court for the Western District of Tennessee have authorized the Bankruptcy Appellate Panel (BAP) to hear and determine appeals originating in the Western District of Tennessee, beginning February 1, 2000.

s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

December 28, 1999